

**Suffolk County Planning Federation
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Planning & Zoning Case Law Update

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Boards of Appeals and Variances

Cohen v. Village of Saddle Rock, 100 NY 2d 395, 764 NYS 2d 64, 795 NE 2d 619 (2003). A local government has no power to supersede or amend the zoning enabling laws to add criteria governing variances which do not appear in the state statute.

Cerame v. Town of Perinton Zoning Board of Appeals, 6 AD 3d 1091, 776 NYS 2d 660, (4th Dept., 2004). In deciding an appeal, a zoning board of appeals is required to conduct a *de novo* review--i.e., to review the case in its entirety and substitute its own judgment for that of the enforcement officer--as opposed to merely reviewing whether the officer's decision was "arbitrary or capricious". On the other hand, a reviewing court is limited to deciding whether the board's decision was arbitrary or capricious, and may not remand the case to the board with specific instructions as to what the board could and could not consider.

Nonconforming Uses

550 Halstead Corp. v. ZBA, Town/Village of Harrison, 1 NY 3rd 561, 772 NYS 2d 249, 804 NE 2d 413 (2003). A local government may regulate the installation of a new storage system in a business, where the business is a lawful nonconforming use, where the system significantly expands the site's storage capacity.

Savetsky, et al. v. BZA, Town of Southampton, 5 AD 3d 779, 774 NYS 2d 188 (2nd Dept., 2004). Where a local regulation provides that abandonment will terminate the lawfulness of a nonconforming use, involuntary cessation of the use under a court order does not constitute such abandonment.

Androme Leather Corporation v. City of Gloversville, 1 AD 3d 654, 766 NYS 2d 462 (3rd Dept., 2003). Addition of a particular industrial process to an industry's activities, at a site where the industry is a lawful nonconforming use, is not necessarily incidental to the underlying business, and may therefore necessitate a variance.

Telecommunications Facilities

Chambers v. Old Stone Hill Road Associates, 1 NY 3d 424, 774 NYS 2d 866, 806 NE 2d 979 (2004). Private covenants having the effect of prohibiting wireless telecommunications facilities may be enforced. The Federal Telecommunications Act does not affect private covenants; it only affects the jurisdiction of local regulatory powers.

Crown Communication New York, Inc. v. Department of Transportation of the State of New York,

309 AD 2d 863, 765 NYS 2d 898 (2nd Dept., 2003). Where the State is immune from local regulation of its wireless telecommunications facility, private providers who lease space on the facility are also immune.

Hours of Operation

Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury, 307 AD 2d 1043, 763 NYS 2d 674 (2nd Dept., 2003). A local government is not empowered to restrict the hours of operation of an otherwise lawful business, through the enactment of zoning regulations, absent a showing that the “atmosphere of the surrounding area” would be adversely affected by the presence of the business.

Sale of Alcoholic Beverages

People v. Amerada Hess Corp., 196 Misc. 2d 426, 765 NYS 2d 202 (Dist. Ct., Nassau Co., 2003). A local government has no power either to require, or enforce, a covenant restricting the sale of alcoholic beverages.

People v. Courtesy Mobil, 3 Misc. 3d 11, 776 NYS 2d 692 (Sup. Ct., App. Term, N.Y., 2003). A local government may not require a retail food store having a State liquor license to maintain inventory levels which would make it impossible for the store to comply with the levels required by the State Liquor Authority as a condition of maintaining the license.

County Referral

Fleckenstein v. Town of Porter and Chemical Waste Management, Inc., 309 AD 2d 1188, 765 NYS 2d 123 (4th Dept., 2003). A full statement under General Municipal Law §239-m is sufficient if it contains a draft generic environmental impact statement instead of the completed environmental assessment form.

Zoning Enforcement

Ardmar Realty Co. v. Building Inspector, Vil. of Tuckahoe, 5 AD 3d 517, 773 NYS 2d 129 (2nd Dept., 2004). A claim of selective enforcement may be upheld where there is a showing that (1) the law was not applied to others similarly situated, and (2) there is no rational basis for the selective application of the law.

Taking of Property

Huntington Yacht Club v. Inc. Vil. of Huntington Bay, 1 AD 3d 480, 767 NYS 2d 132 (2nd Dept., 2003). For takings purposes, there is no protectible property interest in a discretionary permit which has yet to be issued.